No. 95-1717

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

DAVID W. LANIER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-1717

UNITED STATES OF AMERICA, PETITIONER

v.

DAVID W. LANIER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. Respondent acknowledges that his forcible sexual assaults of his victims took place while he was exercising his official duties as the victims' employer or prospective employer in the judicial system (see Resp. Br. 1). He nonetheless contends that the evidence is insufficient to show that he was acting "under color of law" at the time. That issue was not decided by the en banc court of appeals and is not within the questions presented by the certiorari petition. "While it is true that a respondent may defend a judgment on alternative grounds, [the Court] generally do[es] not address arguments that were not the basis for the decision below." *Matsushita Elec.*

Indus. Co., Ltd. v. *Epstein*, 116 S. Ct. 873, 880 n.5 (1996).

In any event, the contention that respondent did not act under color of law is without merit. As the panel that initially affirmed respondent's convictions observed, there is "considerable objective evidence" (Pet. App. 109a) to support the jury's conclusion that respondent used his power to assault his victims and then to intimidate them into silence (*id.* at 108a). Respondent used his official authority, requiring supervision of and meetings with his victims during the working day, to corner them in his office. He warned his secretary Patty Mahoney that, if she told anyone about the assault, "it would hurt [her] more than it would hurt [him]." J.A. 72. He also told another secretary, Sandy Attaway (whom he had assaulted while wearing his judicial robe, see J.A. 30), that "he was a judge, and everybody should be afraid of him." J.A. 32. He threatened to terminate Vivian Archie's custody of her daughter, in order to assault Archie and then to keep her quiet. J.A. 57-58. With Fonda Bandy, he made clear his intention to misuse his power to provide clients for her parenting program by telling her that he would send her clients if she would come back and see him. J.A. 103. That evidence was sufficient for the jury to conclude that respondent acted under color of law.[1]

---

[1] It is settled that, in prosecutions under Section 242, whether the defendant acted "under color of law" is a question to be decided by the jury. See *United States* v. *Tarpley*, 945 F.2d 806, 809 (5th Cir. 1991), cert. denied, 504 U.S. 917 (1992); *Koehler* v. *United States*, 189 F.2d 711, 713 (5th Cir.), cert. denied, 342 U.S. 852 (1951). The trial court in this case instructed the jury that, to sustain its burden of proof, the government was required to prove beyond a reasonable doubt that respondent acted under color of law. J.A. 185. The trial court also defined "under color of law" for the jury, explaining that "[m]isuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is an action taken under color of state law." J.A. 185-186; cf. *United States* v. *Classic*, 313 U.S. 299, 326 (1941) (employing same definition); p. 4, *infra*.

Respondent argues that his assaults were not under color of law because (a) they were not actions taken *as a judge* and (b) they were actions taken to satisfy his personal gratification rather than official policy. Both contentions are wide of the mark. First, whether or not respondent was acting in a judicial capacity when he assaulted his victims, he was, at those times, clearly acting as their official employer or prospective employer (see U.S. Br. 5-8),[2] or exercising an official function related to his supervision of the juvenile court (*id.* at 8). This Court has made clear that, "generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *West* v. *Atkins*, 487 U.S. 42, 50 (1988).[3]

---

[2] "U.S. Br." refers to the government's opening brief in this Court.

[3] The Court has made clear that the "under color of law" element of criminal liability in 18 U.S.C. 242, the "under color of State law" element of civil liability under 42 U.S.C. 1983, and the "state action" requirement of the Fourteenth Amendment all have the same meaning. *West* v. *Atkins*, 487 U.S. 42, 49 (1988); *Monroe* v. *Pape*, 365 U.S. 167, 183-187 (1961), overruled in part on other grounds, *Monell* v. *New York City Dep't of Social Servs.*, 436 U.S. 658 (1978).

Respondent relies on *Polk County* v. *Dodson*, 454 U.S. 312, 325 (1981), for the proposition that a state employee who takes action in the course of performing official duties does not, *ipso facto*, act under color of law. That case, however, involved the

Furthermore, the evidence showed that respondent used his official authority over his victims (as employer, interviewer, or court supervisor), which required meetings with or supervision of the victims in his chambers, to assault them. See U.S. Br. 4-8. "The power which [he was] authorized to exercise was misused," *Screws* v. *United States*, 325 U.S. 91, 110 (1945) (plurality opinion), and that misuse of power was "made possible only because the wrongdoer [was] clothed with the authority of state law," *United States* v. *Classic*, 313 U.S. 299, 326 (1941).

Second, it is irrelevant that respondent might have been motivated by personal reasons to assault his victims. Irrespective of respondent's underlying motivations, it is his abuse of his official power to violate his victims' constitutional rights that implicates Congress's concerns in enacting 18 U.S.C. 242 to enforce those rights. The Fourteenth Amendment and Section 242 were both premised on the assumption that "state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs." *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 227 U.S. 278, 288 (1913).

---

unique situation of a public defender who acts as "the State's adversary" when representing criminal defendants. *Id.* at 322 n.13; see *West* v. *Atkins*, 487 U.S. at 50. Indeed, in *Polk County*, the Court noted that a public defender does act under color of law when performing other official functions, such as those related to hiring and firing employees. See 454 U.S. at 325 (discussing *Branti* v. *Finkel*, 445 U.S. 507 (1980)); see also *West*, 487 U.S. at 49-50 (deeming it "firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position give to him by the State"). The Court has also stated that "state employment is generally sufficient to render the defendant a state actor." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936 n.18 (1982).

The Congress that enacted Section 242 intended that there be a federal remedy for the misuse of state power to abridge federal rights (especially those protected by the Fourteenth Amendment), whether or not that misuse was "authorized" by state law. See *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961), overruled in part on other grounds, *Monell* v. *New York City Dep't of Social Servs.*, 436 U.S. 658 (1978); *Monroe* v. *Pape*, 365 U.S. at 196 & n.5 (Harlan, J., concurring).[4]

In this case, therefore, the "under color of law" element turns on the fact that respondent misused his official power to achieve his aims, rather than on the nature of those aims. In concluding that respondent acted under color of law, the court of appeals panel in this case joined other courts of appeals in rejecting the contention that abuse of state power for personal gratification cannot be action under color of law. See *Brown* v. *Miller*, 631 F.2d 408, 411 (5th Cir. 1980) (concluding that mayor acted under color of state law when he removed city police chief's paychecks to collect debt that police chief owed to mayor's private enterprise, and noting that "it is not significant for purposes of defeating a § 1983 action that the misuse of power under color of state law was motivated solely for purely personal reasons of pecuniary gain"); *United States* v. *Tarpley*, 945 F.2d 806, 809 (5th Cir.

---

[4] In actions brought under 42 U.S.C. 1983, courts of appeals have held that judges were acting under color of state law even when they were engaged in conduct that could not have been undertaken pursuant to their delegated state-law authority. See *Gregory* v. *Thompson*, 500 F.2d 59, 62 (9th Cir. 1974) (judge assaulted observer in his courtroom); *Harris* v. *Harvey*, 605 F.2d 330, 337 (7th Cir. 1979) (judge engaged in racially motivated campaign to discredit police lieutenant), cert. denied, 445 U.S. 938 (1980).

1991) (holding that police officer acted under color of law when he assaulted wife's former lover, because, notwithstanding personal nature of his dispute, he "claimed to have special authority for his actions by virtue of his official status"), cert. denied, 504 U.S. 917 (1992); *United States* v. *Reese*, 2 F.3d 870, 886 (9th Cir. 1993) (rejecting contention that official's action must be intended to "accomplish a governmental objective" to be under color of law, and holding that, "[e]ven if [the officials] were animated by 'purely personal reasons,' [they] would not be immunized from criminal liability under section 242"), cert. denied, 510 U.S. 1094 (1994); *Doe* v. *Taylor Indep. School Dist.*, 15 F.3d 443, 452 n.4 (5th Cir.) (en banc) (sexual assault by public school teacher is action under color of law), cert. denied, 115 S. Ct. 70 (1994); see *id.* at 461 (Higginbotham, J., concurring) ("manipulative course" of victim's teacher, which "afforded him the opportunity to exert his influence," was an "abuse of power conferred by the state").

Contrary to respondents' contention, this Court did not hold in *Screws* that, if officials act for purely personal reasons, they necessarily fail to act "under color of law." "Rather, *Screws* held simply that individuals pursuing private aims *and not acting by virtue of state authority* are not acting under color of law purely because they are state officials." *Tarpley*, 945 F.2d at 809 (emphasis added; citation omitted). *Screws* did make clear that "acts of officers in the ambit of their personal pursuits are plainly excluded." 325 U.S. at 111. This case, however, does not involve such a situation, for respondent was exercising

official power when he committed the acts that formed the basis of his convictions.[5]

2. On the questions presented in the certiorari petition, respondent makes little effort to defend the en banc court of appeals' central holding, *viz.*, that the violation of a constitutional right may not be prosecuted under Section 242 unless a decision of this Court has previously recognized the application of the right in a fundamentally similar factual situation (see Pet. App. 29a). Rather, respondent argues that (a) Section 242 reaches only violations of constitutional rights protected by specific guarantees of the Bill of Rights, and not violations of the Due Process Clause

---

[5] Respondent relies on *Delcambre* v. *Delcambre*, 635 F.2d 407 (5th Cir. 1981), *Rogers* v. *Fuller*, 410 F. Supp. 187 (M.D.N.C. 1976), and *Murphy* v. *Chicago Transit Authority*, 638 F. Supp. 464 (N.D. Ill. 1986) (see Resp. Br. 9), but those cases do not suggest a contrary result here. *Delcambre* concluded that a police chief's assault against his sister-in-law at the police station was not action under color of state law, but there was no evidence in that case that the defendant had used his official power in committing the assault. See 635 F.2d at 408. *Rogers*, which held that theft by police officers during the execution of a search was not action under color of state law, has been rejected as "unpersuasive." See *Brown*, 631 F.2d at 411 n.5. *Murphy*, which held that sexual harassment by the plaintiff's co-workers was not action under color of state law, rested on the crucial fact that the harassers had no authority over the victim. See *Woodward* v. *City of Worland*, 977 F.2d 1392, 1400 (10th Cir. 1992), cert. denied, 509 U.S. 923 (1993). The courts have not suggested that sexual harassment by a *supervisor* with employment authority would not be action under color of law, even if that supervisor might be said to be acting for personal gratification rather than a governmental purpose. See *id.* at 1400-1401; cf. *Dang Vang* v. *Vang Xiong X. Toyed*, 944 F.2d 476, 479-480 (9th Cir. 1991) (rape by welfare official was action under color of state law).

itself (Resp. Br. 13-20), and (b) at most, the Due Process Clause protects only persons in custodial situations from assaults by state officials (*id.* at 21-29). Neither contention withstands scrutiny.

a. Respondent argues that, under *Screws*, Section 242 may be applied only to the deprivation of "specifically defined constitutional protections" and not rights based on "judicial interpretations of broad due process concepts" (Resp. Br. 18-19). He contends that *Screws rejected* a reading of Section 242 that reaches violations of the Due Process Clause itself, because the Court was faced with the choice of "a narrow incorporation approach, or no criminal due process law at all." Resp. Br. 20. That submission is plainly incorrect.

The Court in *Screws* held expressly that public officials may be punished under Section 242 for the violation of the due process rights "made specific" by "decisions interpreting them." 325 U.S. at 104; see *id.* at 105. The Court has also made clear elsewhere that both Section 242 and its companion conspiracy statute, 18 U.S.C. 241, reach all rights protected by the Constitution and laws of the United States. "Neither [Section] is qualified or limited. Each includes * * * *all* of the Constitution and laws of the United States." *United States* v. *Price*, 383 U.S. 787, 797 (1966).[6] Sections 241 and 242 "dealt with Federal rights and with all Federal rights, and protected them in the lump." See *United States* v. *Mosley*, 238 U.S.

[6] Although the Court was once closely divided on the question whether Section 241 reached rights protected by the Fourteenth Amendment, see *United States* v. *Williams*, 341 U.S. 70 (1951), it has never suggested that Section 242 does not cover all rights protected by the Fourteenth Amendment.

383, 387 (1915) (Holmes, J.). Accordingly, "an offense under § 242 is properly stated by allegations of willful deprivation, under color of law, of life [or] liberty without due process of law," without more. *Price*, 383 U.S. at 793.[7]

The Court in *Screws* carefully noted that Section 242 protects both rights made specific "by the express terms of the Constitution," and other rights made specific "by decisions interpreting them," as (in the latter case), for example, rights protected by the Due Process Clause itself. See 325 U.S. at 104-105. The Court also observed that the Due Process Clause "formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights." *Id.* at 95. It nonetheless held that, once a due process right has been made specific by court decisions, "a person acting with reference to the statute [has] fair warning that his conduct is within its prohibition." *Id.* at 104.

It is true that, when the Court in *Screws* sustained the constitutionality of Section 242 as applied to rights protected by the Due Process Clause of the Fourteenth Amendment, it referred to several cases

[7] Respondent notes (Resp. Br. 18) that in *Screws* the Court stated that "[t]he fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States." 325 U.S. at 108-109. That language comes from the Court's discussion of the "under color of law" element of Section 242, not its earlier discussion of rights protected by the Due Process Clause (see 325 U.S. at 94-100). The Court emphasized in that context that the Fourteenth Amendment and Section 242 reach only the abuse of governmental power by officials, not all violations of state law. See 325 U.S. at 108.

that, under more recent analysis, might have been decided as interpretations of specific provisions of the Bill of Rights, as incorporated against the States by the Due Process Clause. See 325 U.S. at 97. That does not mean, however, that the Court adopted what "was, in essence, a narrow application of [Justice Black's] incorporation theory," as respondent suggests (Resp. Br. 17). In fact, some of the cases cited in *Screws* were expressly decided under the Due Process Clause itself, without reliance on or reference to the original Bill of Rights.[8]

Graham v. *Connor*, 490 U.S. 386 (1989), did not alter the rule established by this Court's decisions that both Section 242 and 42 U.S.C. 1983 may be used to vindicate a liberty interest in bodily integrity protected by the Due Process Clause itself. In *Graham*, the Court concluded that, when an "excessive force claim arises in the context of an arrest or investigatory stop of a free citizen," that claim must be analyzed "under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id.* at 394-395. The Court's holding, however, was addressed and limited to the situation where a "more specific constitutional right governed by a different standard" than that of the Due Process Clause bears directly on the facts of

---

[8] See, *e.g.*, *Powell* v. *Alabama*, 287 U.S. 45, 60 (1932) (holding that "the denial of the assistance of counsel [in a capital case] contravenes the due process clause of the Fourteenth Amendment"); *Olsen* v. *Nebraska*, 313 U.S. 236, 243 (1941) (holding that application of state price-control statute does not violate "the due process clause of the Fourteenth Amendment"); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 145, 154 (1944) (holding that involuntary confession extracted by lengthy questioning violates the Fourteenth Amendment).

the case at hand. *Id.* at 393. Because the use of force may often be justified during arrests, the conduct of police in that situation should not be governed by "a single generic standard," *ibid.*, but by standards developed in light of the specific governmental interest relevant to the Fourth Amendment. The Court did not suggest in *Graham* that persons not being arrested or stopped by police lack any constitutional protection under the Due Process Clause against physically abusive conduct by government officials. See also *id.* at 395 n.10 (reaffirming that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment").

b. Respondent argues that "assaults that occur when the victim is not subject to the custody and control of the state do not violate his due process liberty interest." Resp. Br. 22. As support for that proposition, respondent relies heavily (*id.* at 24-27) on *DeShaney* v. *Winnebago County Department of Social Services*, 489 U.S. 189 (1989). *DeShaney*, however, involved the quite different situation of the State's failure to protect someone from assault by a *private* actor. The Court ruled that the Due Process Clause does not (outside a non-custodial setting) impose affirmative obligations on the State to prevent harm by private actors. The Court stated that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. * * * Its purpose was to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 195-196. *DeShaney* does not cast any doubt on the settled rule that the Due Process Clause prohibits officials from misusing

their power to engage *themselves* in completely unjustified assaults on citizens.[9]

Respondent's submission that the Due Process Clause protects *only* those in custody from intentional, unjustified assaults by state officials is almost the reverse of the correct view. A custodial situation may create a justification for the use of force that would not exist with respect to a free person; for example, force that would not be justified in a judge's encounter with a free person might be justified in the management of inmates of psychiatric institutions. Thus, when the Court considered, in *Ingraham* v. *Wright*, 430 U.S. 651 (1977), and *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), whether school children and psychiatric inmates have a right to personal security protected by the Fourteenth Amendment, the difficulty in those cases was created by the fact that the plaintiffs were under supervision, such that some physical force might be justified in their correction, treatment, or management. As the Court noted in *Ingraham*, the child's liberty interest in avoiding corporal punishment had always been subject to "historical limitations" because of the particular context, and in particular because a teacher was historically deemed justified in giving "moderate correction" to a child. See 430 U.S. at 675. But the Court also made clear that among the "historic liberties" enjoyed by free persons under the common law, and therefore protected by the Due Process Clause, was "a right to be free from * * * unjustified intrusions on personal security." *Id.* at 673. See also *Young-*

[9] The three court of appeals cases following *DeShaney* cited by respondent (Resp. Br. 28) similarly involve the State's failure to prevent harm caused by private actors.

berg, 457 U.S. at 315 (concluding that the liberty interest in personal security protected by the Due Process Clause is not "extinguished" by lawful confinement in a psychiatric institution).

3. Respondent suggests (Resp. Br. 22) that "there is no judicial precedent for holding that a non-custodial assault violates [Section] 242." As a factual matter, that assertion is incorrect. See *United States* v. *Tarpley*, 945 F.2d 806 (5th Cir. 1991) (holding that assault by deputy sheriff on wife's former lover in his own home was under color of law), cert. denied, 504 U.S. 917 (1992). Most reported decisions under Section 242 do involve custodial situations, but that reflects the fact that officials have greater opportunity to engage in assaults using the authority of their office when the victims are in their custody. The Department of Justice has in the past prosecuted several Section 242 cases involving non-custodial situations, including two cases involving sexual assaults by judges that resulted in guilty pleas. See U.S. Br. 19 n.6.

Furthermore, there have long been reported cases arising under 42 U.S.C. 1983 establishing that unjustified assaults by state officials in non-custodial situations violate a liberty interest in bodily integrity protected by the Due Process Clause. See *Gregory* v. *Thompson*, 500 F.2d 59, 62 (9th Cir. 1974); *Shillingford* v. *Holmes*, 634 F.2d 263 (5th Cir. 1981); *Wassum* v. *City of Bellaire*, 861 F.2d 453, 454-455 (5th Cir. 1988); *Dang Vang* v. *Vang Xiong X. Toyed*, 944 F.2d 476, 479-480 (9th Cir. 1991). And there is "nothing wrong with looking to a civil case brought under 42 U.S.C. § 1983 for guidance as to the nature of the constitutional right whose alleged violation has been made the basis of section 242 charge," for the two

Sections protect "the same constitutional rights." *Reese*, 2 F.3d at 884. Accordingly, respondent cannot claim to have been surprised that his "non-custodial" rapes and assaults violated his victims' constitutional rights.

4. Respondent argues that, for purposes of prosecution under Section 242, a violation of a liberty interest protected by the Due Process Clause cannot depend on whether the jury concludes that the defendant's action "shocks the conscience." Resp. Br. 29. Like the court of appeals, respondent misapprehends the purpose of the trial court's "shocks the conscience" instruction to the jury (to which respondent did not object at trial). The district court viewed the "shocks the conscience" language as an additional safeguard for the respondent. The court used that language in emphasizing that the physical abuse committed by respondent must be "serious [and] substantial" to constitute a violation of the constitutional right to bodily integrity. J.A. 186-187.

As we have explained (U.S. Br. 45-46), it was not necessary for the government to prove in this case that respondent's actions shock the conscience. Because rape and sexual assault by a government official can never have a permissible justification, and because due process requires, at a minimum, that the government have a permissible justification for making an actual physical intrusion onto a person's body (see U.S. Br. 40-41), proof that respondent sexually assaulted his victims willfully and under color of law was sufficient to establish the deprivation of a right protected by the Due Process Clause.[10]

---

[10] The trial court's jury instructions stated that, "[i]ncluded in the liberty protected by the Fourteenth Amendment is the concept of personal bodily integrity and the right to be free from unauthorized and unlawful physical abuse by state intrusion." J.A. 186. The court also instructed that the constitutional right to bodily integrity includes the "right to be free from willful sexual assault." *Ibid.* Thus, the instructions correctly identified the constitutional right that respondent was charged with violating in committing the sexual assaults.

5. Respondent argues that our construction of Section 242 would transform all state-law assaults into federal crimes, and would thereby upset the "balance between state and federal law enforcement." Resp. Br. 36. That concern has no relevance, however, in the context of unjustified assaults by a state official acting under color of law—actions that have been recognized to implicate a liberty interest protected by the Due Process Clause. See U.S. Br. 38-45; *Youngberg*, 457 U.S. at 315-316; *Ingraham*, 430 U.S. at 673-674. Application of Section 242 in cases like this one is fully consistent with Congress's objective of "provid[ing] a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Monroe* v. *Pape*, 365 U.S. at 174.

Respondent also makes the related argument that the sexual assaults cannot constitute due process violations because of the existence of adequate post-deprivation remedies under state law (including the possibility of prosecution under state law). Resp. Br. 36-38. Respondent analogizes this case to *Parratt* v. *Taylor*, 451 U.S. 527 (1981), where the Court held that, although an inmate had been deprived of a property interest under color of law, that deprivation did not violate due process because there were adequate post-deprivation state-law remedies. That case, however, as well as the others cited by respondent,

involved claims that official action violated the Due Process Clause's guarantee of fair *procedures*.[11] The Court emphasized in those cases that, as a matter of procedural due process, "the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Zinermon* v. *Burch*, 494 U.S. 113, 125 (1990). Thus, "[t]he constitutional violation actionable * * * is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." *Id.* at 126.

This case, by contrast, involves the charge that the rapes and sexual assaults themselves deprived the victims of liberty protected by the Due Process Clause. Since "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them,'" the "constitutional violation * * * is complete when the wrongful action is taken." *Zinermon*, 494 U.S. at 125. Thus, the *Parratt* doctrine has no bearing on abuse of power that, regardless of procedure, consti-

[11] In *Ingraham*, the Court addressed whether corporal punishment in schools without prior notice or the opportunity to be heard violated procedural due process. The Court held that procedural due process was not violated in that case, but it also expressly held that the case implicated a substantive liberty interest protected by the Due Process Clause. 430 U.S. at 653, 683. In *Hudson* v. *Palmer*, 468 U.S. 517, 533 (1984), the Court held that intentional deprivations of property do not violate "the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available."

tutes a deprivation of liberty without due process of law. See also *Daniels* v. *Williams*, 474 U.S. 327, 331-332) (1986) (noting that, "by barring certain government actions regardless of the fairness of the procedures used to implement them," the Due Process Clause "serves to prevent government power from being 'used for purposes of oppression'"). In cases like this one, the conduct that was alleged and proven "would remain unjustified even if it were accompanied by the most stringent of procedural safeguards." *Gilmere* v. *City of Atlanta*, 774 F.2d 1495, 1500 (11th Cir. 1985) (en banc), cert. denied, 476 U.S. 1115 and 1124 (1986).[12]

* * * * *

For the foregoing reasons, and for the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

OCTOBER 1996

[12] Furthermore, in the procedural due process cases cited by respondent, the Court pointed to alternative post-deprivation *civil* remedies under state law as indications that the plaintiff was not deprived of procedural due process. The Court has not, to our knowledge, suggested that state-law criminal remedies (brought at the discretion of a prosecutor) could provide an adequate post-deprivation remedy for one deprived of a liberty interest.